

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Petition of BellSouth Corporation for)	
Forbearance from the Prohibition of Sharing)	CC Docket No. 96-149
Operating, Installation, and Maintenance)	
Functions under Section 53.203(a)(2)-(3) of)	
the Commission's Rules)	

OPPOSITION OF AMERICATEL CORPORATION

Americatel Corporation (“Americatel”),¹ through counsel, respectfully submits its opposition to the petition for forbearance (“Petition”) that was filed by BellSouth Corp. (“BellSouth”), on July 14, 2003, in the above-captioned proceeding.² The Petition requests that the Federal Communications Commission (“FCC” or “Commission”) forbear from enforcing Sections 53.203(a)(2) and 53.203(a)(3) of its rules.³ Those sections prohibit the sharing of operating, installation, and maintenance (“OI&M”) functions by Section 272 affiliates⁴ which

¹ Americatel, a Delaware corporation that is a subsidiary of ENTEL Chile, is a common carrier providing domestic and international telecommunications services. ENTEL Chile is the largest provider of long distance services in Chile. Americatel also operates as an Internet Service Provider (“ISP”). Americatel specializes in serving Hispanic communities throughout the United States, offering presubscribed (1+), dial-around, and prepaid long distance services, as well as private line and other high-speed services to its business customers. The majority of traffic carried by Americatel is dial-around in nature.

² *Petition of BellSouth Corporation for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions under Section 53.203(a)(2)-(3) of the Commission's Rules*, Public Notice, CC Docket No. 96-149, DA 03-2340 (rel. July 16, 2003) (“Public Notice”).

³ 47 C.F.R. §§53.203(a)(2) and 53.203(a)(3).

⁴ Congress enacted Section 272 of the Communications Act of 1934, as amended (“Act”), 47 U.S.C. §272, in order to protect competition from potential anti-competitive acts by the BOCs once they were permitted to reenter the long distance market.

provide interstate and international, interexchange services and Bell Operating Companies (“BOCs”), and also by Section 272 affiliates and other affiliates of the BOCs.

Americatel opposes BellSouth’s request for forbearance because it seeks relief from some of the Section 272 restrictions that are being considered by the Commission in a broader inquiry into the regulation of the BOCs’ provision of long distance services.⁵ Most of the parties filing comments and reply comments in the latter proceeding have, in fact, urged that additional regulations be placed on the BOCs and their Section 272 affiliates to prevent re-monopolization of the long distance market.⁶ Based on this record, the FCC might well decide that it should impose more regulation, not less, on the BOCs and their Section 272 affiliates. Therefore, it would be premature and unfair for the FCC to grant BellSouth’s Petition in this proceeding until the Commission makes its decisions in the broader proceeding.

BellSouth has now joined two other BOCs, Verizon Communications (“Verizon”)⁷ and SBC Communications (“SBC”),⁸ in seeking FCC permission to share OI&M

⁵ *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements and 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission’s Rules*, Further Notice of Proposed Rulemaking, WC Docket No. 02-112 and CC Docket No. 00-175, FCC 03-111 (rel. May 19, 2003) (“*Further Notice*”).

⁶ *See, e.g.*, Corrected Comments of Americatel; Comments of Ad Hoc Telecommunications Users Council; Comments of AT&T Corp.; Comments of MCI; Comments of the Texas Attorney General; Comments of the Texas Public Utilities Commission (all filed June 30, 2003, in WC Docket No. 02-112 and CC Docket No. 00-175); Reply Comments of Americatel; Reply Comments of BT Americas, Inc.; Reply Comments of ALTS; Reply Comments of the California Public Utilities Commission; and Reply Comments of Time Warner Telecom (all filed July 28, 2003, in WC Docket No. 02-112 and CC Docket No. 00-175).

⁷ *Wireline Competition Bureau Seeks Comment on Verizon’s Petition for Forbearance from the Prohibition of Sharing Operating, Installation and Maintenance Functions*, Public Notice, CC Docket No. 96-149, DA-02-1989 (rel. August 9, 2002).

⁸ *Comment Dates Set for Petition for Forbearance and Modification Filed by SBC Communications Inc.*, Public Notice, CC Docket No. 96-149, DA-03-1920 (rel. June 10, 2003).

functions that are currently performed separately by the BOCs and their Section 272 affiliates. BellSouth argues that these restrictions, which were designed and adopted to ensure that the BOCs and their Section 272 affiliates are, in fact, separate from each other, as contemplated by Congress, impose unnecessary costs and inefficiencies on BellSouth.⁹ BellSouth further argues that it has satisfied the conditions for forbearance that are set forth in Section 10(a) of the Act.¹⁰

The Commission is required by Congress to consider whether “forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”¹¹ Only in the event that the FCC determines that forbearance would promote “competitive market conditions,” may it forbear from regulation.¹²

⁹ BellSouth Petition, at 2-4. The BOCs have been arguing that they should be permitted to avoid additional costs by sharing OI&M operations between their regulated and unregulated subsidiaries for years, and the FCC has also been rejecting that type of request because the sharing of such functions would necessitate “excessive, costly and burdensome regulatory involvement in the operations, plans and day-to-day activities of the [BOCs] ... to audit and monitor the accounting plans necessary for such sharing to take place.” *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies and North American Telephone Ass’n Petition for Declaratory Ruling on the Requirement for Sale of Customer Premises Equipment by the Bell Operating Companies*, Report & Order, 95 FCC 2d 1117, at ¶70 (1983). See also, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report & Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, at ¶163 (1996) (subsequent history omitted).

¹⁰ 47 U.S.C. §160(a). Under this section, the FCC must forbear from applying its regulations or any provision of the Act to a carrier if, but only if, the FCC finds that:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.

¹¹ *Id.*, at §160(b).

¹² *Id.*

As noted above, the Commission is currently undertaking a careful investigation of broader, but clearly related, questions concerning to the regulation of BOCs and their Section 272 affiliates.¹³ In that proceeding (WC Docket No. 02-112 and CC Docket No. 00-175), the FCC is seeking comments on “the appropriate classification of [the BOCs’] provision of in-region, interstate and international interexchange telecommunications services,” *i.e.*, whether the BOCs should continue to be regulated as “Dominant Carriers” in the event that they were permitted to provide those services on an integrated basis; and whether the FCC should continue to require ILECs to provide in-region interexchange services through a separate affiliate.¹⁴ The BellSouth Petition, along with those of Verizon and SBC, if granted, would likely have the effect of prejudging the outcome of the *Further Notice* in favor of the BOCs. Such a result, at this time, would be unfair and unreasonable.

Various parties, MCI, for example, have urged the Commission in comments filed in response to the *Further Notice*, to impose even more safeguards on the BOCs and their Section 272 affiliates.¹⁵ It is possible that, once the FCC considers the entire, but not yet complete, record in WC Docket No. 02-112 and CC Docket No. 00-175, it might well adopt additional safeguards to ensure that competition for all telecommunications services can not only exist, but also thrive.

It is also quite possible that, if the FCC were to permit BellSouth and its Section 272 affiliate to share OI&M services now, it might become more difficult or, indeed, even

¹³ *Further Notice*.

¹⁴ *Id.*, at 2.

¹⁵ *See, e.g.*, Comments of MCI in WC Docket No. 02-112 and CC Docket No. 00-175, at 26-32 (filed June 30, 2003). *See also*, Corrected Comments of Americatel in WC Docket No. 02-112 and CC Docket No. 00-175, at 30, *et seq.* (filed June 30, 2003).

impossible for the FCC later to impose additional safeguards on the BOCs in an effective manner. Hence, it would not be appropriate for the Commission to grant the instant relief requested by BellSouth until after the FCC makes its decisions on important policy issues contained in the *Further Notice*. Such a result is required by precedent. The Commission has long held that it will not prejudice the outcome of one of its other inquiries in favor of any party.

For example, the FCC refused to permit parties to interconnect customer-provided PBX switches, Key Telephone Systems, and coin-operated telephones to the network in one proceeding, because the Commission was, at the very same time, considering the economic impacts of extending customer-provided terminal equipment interconnection rights in another related proceeding. To do otherwise by permitting expanded interconnection rights would have resulted in an effective determination of the economic issues being decided in the second proceeding without the benefit of the record being developed in the second proceeding.¹⁶ Such a result would not be in the public interest.

Not only might the granting of BellSouth's request to share OIM functions between its regulated local service operations and its Section 272 affiliate be inconsistent with the Commission's final decision in WC Docket No. 02-112 and CC Docket No. 00-175, but it also would effectively preclude parties from fully advocating their case in that proceeding. For example, BellSouth argues that the Commission's grant of permission to BellSouth to share OI&M functions with its Section 272 affiliate would not create any harm to ratepayers, even in the event that OI&M costs were misallocated between the two companies because "the price cap system

¹⁶ *Proposal for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, Second Report & Order, 58 FCC 2d 73, at ¶13 (1976). See also, *Bachow/Coastel, L.L.C., v. GTE Wireless of the South, Inc.*, Order on Review, 16 FCC Rcd 4967 (2001).

[that applies to BellSouth's interstate access charges] has broken the link between costs and rates.”¹⁷ However, AT&T, in response to the *Further Notice*, provided the declaration of Dr. Lee Selwyn, a highly regarded and experienced telecommunications economist, demonstrating that price cap regulation “is not by itself sufficient as a means for identifying or for preventing a BOC from using excess profits generated from monopoly local services to cross-subsidize competitive long distance services.”¹⁸ Dr. Selwyn explains that price cap regulation removes agency oversight from the price setting process and facilitates cost shifting by the BOCs through improper transactions with the affiliates. He also explains that price cap plans permit the BOCs to raise prices significantly for individual services or to have various services be largely price deregulated without first demonstrating that the BOCs do not have effective market power over those services.¹⁹ This evidence contradicts BellSouth's claims about the efficacy of price cap regulation.

In order to grant the relief requested by BellSouth, the Commission would likely be required to make a finding that price cap regulation provides the level of ratepayer protections alleged by the Petitioner herein, without the benefit of the more robust record that is being developed in the larger proceeding. The public interest would be better served if the FCC were to decide the efficacy of price cap regulation under changed market conditions in the more global proceeding, rather than pursuant to narrow and individualized petitions for forbearance.

The FCC should, therefore, find that, until it decides the related, but broader, issues concerning to the BOCs' provision of in-region, long distance services, including issues

¹⁷ BellSouth Petition, at 6.

¹⁸ Declaration of Dr. Lee Selwyn, attached to the Comments of AT&T in WC Docket No. 02-112 and CC Docket No. 00-175, at 93 (filed June 30, 2003).

¹⁹ *Id.*, at 93-95.

related to the imposition of additional safeguards on the BOCs, it will not have sufficient evidence to support a determination that forbearance in BellSouth's case would promote "competitive market conditions." As noted above, absent such a determination, the Commission must, under applicable law, deny BellSouth's instant Petition.

Conclusion

For the reasons set forth above, the Commission should deny and dismiss BellSouth's Petition.

Respectfully submitted,
AMERICATEL CORPORATION

By: _____ s/

Judith L. Harris
Robert H. Jackson
Reed Smith LLP
1301 K Street, N.W.
Suite 1100 – East Tower
Washington, D.C. 20005
202.414.9200
202.414.9299 (fax)
Its Attorneys

Dated: August 5, 2003

CERTIFICATE OF SERVICE

I, Lila A. Myers, do hereby certify that the foregoing **OPPOSITION TO PETITION FOR FORBEARANCE OF AMERICATEL CORPORATION** was served on this 5th day of August, 2003 upon the following in the fashion indicated:

William Maher, Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Via E-mail

Jeffrey Carlisle, Senior Deputy Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Via E-mail

Carol Matthey, Deputy Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Via E-mail

Michelle M. Carey, Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Via E-mail

Gregory M. Cooke, Deputy Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Via E-mail

Janis Myles
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Via E-mail

Qualex International,
Portals II
445 12th Street, SW, CY-B402
Washington, D.C. 20554

Via E-mail

Jonathan Banks
L. Barbee Ponder, IV
BellSouth D.C., Inc.
1133 21st Street, N.W.
Suite 900
Washington, DC 20036

Via U.S. Mail

/s/_____
Lila A. Myers